No. 15186

United States
Court of Appeals
For the Ninth Circuit

JENNIE R. DUFF and ELIZABETH BRONSON, Appellants,

vs.

H. L. PAGE, Appellee.

Brief of Appellants

Appeal from the United State District Court for the District of Nevada

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OPENING BRIEF OF APPELLANTS

I

Statement as to Jurisdiction of Court

This is an action based on negligence and was originally brought in the District Court of the United States, in and for the District of Nevada, Northern Division, by John A. Duff and Jennie R. Duff, his wife, and Elizabeth Bronson, Plaintiffs, against H. L. Page, Defendant, for the recovery of damages in excess of $3000.00 for injuries alleged to have been suffered by plaintiffs by reason of a certain automobile collision. At the time of the commencement of said action plaintiffs, John A. Duff and Jennie R. Duff, his wife, were citizens of the State of Idaho, and the plaintiff, Elizabeth Bronson, was a citizen of the State of California, and at the time of the commencement of said action defendant, H. L. Page, was a citizen of the State of Nevada.

The District Court had jurisdiction of this matter on the basis of diversity of citizenship, and the amount sued for, exclusive of interest, being in excess of $3000.00, all pursuant to statutory authority found in 28 USCA, Section 1332. The facts necessary to show the jurisdiction of the Disrict Court, as set forth above, were plead by the plaintiffs in their Complaint For Damages as now found in the Transcript of Record at the following pages:

page 3: Allegations as to the citizenship of the parties
page 5 and 6: Amount sued for by plaintiff, John R. Duff
page 7: Amount sued for by plaintiff, Jennie R. Duff
page 9: Amount sued for by plaintiff, Elizabeth Bronson

A statement of the Jurisdiction of the District Court is also found in the Pretrial Order at page 23 of the Transcript of Record.

The United States Court of Appeals for the Ninth Circuit has jurisdiction to review the judgments herein appealed from (page 45, Transcript of Record) by reason of the fact that the same are final judgments and by the au-

thority of the statutory provisions found in 28 USCA, Sections 1291 and 1294, which sections provide, in substance, that the courts of appeal shall have jurisdiction of appeals from the final decisions of the District Courts of the United States and that the appeal be taken to the Circuit Court embracing the district in which the District Court in question is located. Reference is hereby made to the Notice of Appeal filed herein (pages 45 and 46, Transcript of Record).

II

STATEMENT OF THE CASE

This action was brought by plaintiffs, John A. Duff and Jennie R. Duff, his wife, and Elizabeth Bronson, to recover damages for personal injuries sustained by them on the 31st day of December, 1954, when a 1955 DeSoto automobile, in which they were riding, collided with an auto wrecker owned and operated by the defendant, H. L. Page. The original pleadings were the Complaint of the plaintiffs, the Answer and Counterclaim of the defendant and the Reply to Counterclaim filed by the plaintiffs. Since the Counterclaim is not at issue in this appeal, no further reference to the same will be made. These original pleadings were superceded by the Pretrial order of the District Court (page 23 Transcript of record) and the amendments thereto (page 37, Transcript of Record).

The agreed facts are that about the hour of 10:00, A.M., on the 31st day of December, 1954, defendant was in the process of removing an automobile and trailer from a snow bank off the north side of Highway No. 40, a public highway, at a point approximately fourteen miles west of Wells, Nevada, and at said time and place had his 1941 Studebaker wrecker parked in the west bound traffic lane of said highway; that the plaintiffs were proceeding west in a 1955 DeSoto automobile owned and driven by plaintiff, John A. Duff. The plaintiff, Jennie R. Duff, the wife of plaintiff

John A. Duff, was riding in the back seat and the plaintiff, Elizabeth Bronson, was seated in the front seat next to the driver. There was a straight approach of highway of approximately .4 miles from the east, with a down grade of 3.34% toward the parked wrecker. The road was oil surfaced and approximately 43 feet wide with a broken white painted center line including about 7½ feet of mixed oil and gravel shoulder on the north side and 8 feet of shoulder on the south side. The day was overcast. The DeSoto automobile at said time and place collided with the Studebaker wrecker and the plaintiffs suffered personal injuries as a result thereof.

In addition to the above facts, the plaintiffs allegations and contentions are that the injuries to the plaintiffs were a proximate result of the negligence of defendant in that the wrecker was almost 17 feet in length and parked on the highway illegally and contrary to Section 4365, **Nevada Compiled Laws, 1929,** and parked almost straight across the west bound traffic lane with its front end almost to the white center line on the highway, it's rear end extending to the beginning of the oil and gravel north shoulder; that there were no signals, flares, signs, or other warnings on the wrecker, or on or near the highway; that there was no need or reason for the wrecker to be parked blocking the west bound traffic lane, but that the wrecker could have accomplished its business by parking off the main traveled portion of the highway; that the negligence, if any, of John A. Duff, the driver of the 1955 DeSoto automobile, was not the sole proximate cause of the accident; that the plaintiffs, Jennie R. Duff and Elizabeth Bronson, and each of them, were free from contributory negligence.

To the allegations and contentions of the plaintiffs, the defendant answered that he was lawfully parked on the highway in pursuit of the business for which he had been called; that a red blinker light was on the wrecker and In

full operation; that the plaintiffs, as they approached, had a clear unobstructed view down the highway to the west toward the wrecker of approximately .4 miles; that the road was wet but presented a safe driving surface; that the collision was due entirely to the negligence of the plaintiffs and that the defendant was not negligent, or that, in any event if the defendant was negligent, his negligence was not a proximate cause of the collision and injuries to the plaintiffs. Defendant raised the following defenses against the plaintiffs Jennie R. Duff and Elizabeth Bronson, who are the appellants herein:

1. General denial of negligence on the part of the defendant

2. Contributory Negligence on the part of Jennie R. Duff and Elizabeth Bronson.

3. That the sole negligence of plaintiff John A. Duff, was the proximate cause of the collision and injuries, or the concurrent negligence of John A. Duff plus the contributory negligence of Jennie R. Duff and Elizabeth Bronson, was the proximate cause of the collision and injuries.

4. That if defendant was negligent his negligence was not the approximate cause of collission and injuries, but that the same was caused by the sole negligence of John A. Duff, or concurring negligence of John A. Duff and contributory negligence on the part of Jennie R. Duff and Elizabeth Bronson.

5. That the injuries of Jennie R. Duff and Elizabeth Bronson were due to the failure of John A. Duff to observe the last clear chance rule.

6. That the accident was unavoidable.

Commencing November 7, 1955, the above matter was tried before a jury in the District Court on the basis of the

above allegations and agreed statement of facts as the same were set forth in the Pretrial Order of the District Court (Page 23, Transcript of Record) and the amendment thereto (Page 37, Transcript of Record).

Before the trial commenced the plaintiffs handed to the presiding Judge, John R. Ross, a paper designated "Questions requested by plaintiffs of Jurors." That one of the questions was, "Do you own any stocks or bonds in the American Casualty Co." (page 37, Transcript of Record). The Judge indicated he would not ask the said question and in fact did not ask the said question, or any similar question, of the prospective jurors, nor did counsel for plaintiffs have the opportunity to ask said question of the prospective jurors, although plaintiff pointed out to the Court in chambers that said question was a proper question to be asked of the prospective jurors.

During the course of the trial, defendant's attorney, on cross examination, asked plaintiffs' witness, Earl Remington, if it were not a fact that the plaintiff, Duff, was driving too fast under those conditions and witness answered, "Yes." (Page 168, Transcript of Record). On redirect examination, plaintiff tried to ask questions to show what the witness meant by such a statement, but the defendant objected and the Court sustained the objections. (Page 169, Transcript of Record).

Also on several occasions during the course of the trial, plaintiffs attempted to introduce evidence from expert witnesses as to the customary manner of towing a trailer onto the highway and to show that it was practical to do the towing job without getting on the traveled portion of the highway, but the Court in each instance refused plaintiffs the right to introduce such evidence. (Transcript of Record, pages 352-361). Plaintiffs also attempted to intro-

duce evidence to show the custom and usage of putting out flags, or other warning devices, but in each instance the Court refused plaintiffs the right to introduce such evidence. (Transcript of Record, page 357).

When the defendant, H. L. Page, was testifying he volunteered the statement that his tow truck was an emergency vehicle. (Transcript of Record, page 78). Thereafter the plaintiffs moved to have this answer stricken as the conclusion of the witness, but the same was denied by the Court (Transcript of Record, page 78 and page 306).

At the settling of the instructions, plaintiffs took exception to Instruction No. 12 offered by the Court (Transcript of Records, page 307) and also offered Instructions numbered A through M, which instructions were refused by the Court. (Transcript of Record, page 309).

The matter was submitted to the Jury, which rendered a verdict in favor of the defendant and against the plaintiffs, each of them, and thereupon, on November 16, 1955, judgment was entered in favor of the defendant and against the plaintiffs, and each of them. (Transcript of Record, page 40). On November 22, 1955, plaintiffs filed a Motion for a New Trial (Transcript of Record, page 43) which motion was denied by the Court on March 5, 1956 (Transcript of Record, page 44). Thereafter, on April 11, 1956, two of the plaintiffs, Jennie R. Duff and Elizabeth Bronson, filed their Notice of Appeal from the judgment entered against them and from the Order Denying Motion for New Trial (Transcript of Record, page 45).

III

SPECIFICATION OF ERRORS

1. It was error for the District Court to refuse to ask the Jurors if they owned any stocks or bonds in the American

Casualty Company. Before the trial commenced, the plaintiffs, in writing, specifically asked the trial Judge to ask this question in the voir dire examination of the Jurors on the grounds that said question was a proper question and necessary to determine the qualifications of the Jurors and the exercise of the peremptory challenge. The District Judge refused to give this question. Transcript of Record, page 37).

2. It was error for the District Court to refuse appellants the right to get the full explanation from their witness, Earl Remington, concerning his statement that John A. Duff was driving too fast. On cross examination Earl Remington testified as follows:

Q. You remember at the time you saw this car you were on an icy hill? A. Yes.

Q. You knew at that time that the car was travelling too fast for those conditions? A. For those conditions at that particular spot, yes sir.

Q. It was traveling too fast when it came over the hill on the ice? A. Yes.

Q. That is the reason you blinked your light, because it was going too fast to go around the wrecker? A. I blinked my lights to avoid an accident.

Q. You knew he was going too fast to control the car and go around the wrecker? A. That I wouldn't say.

Q. In fact you told Mr. Page, after the accident, when you walked down to the scene, the reason you blinked your lights was because the man was traveling too fast for the road conditions? A. That is right.

Q. And that is just your opinion? A. Yes, just my opinion at the time, 45 or 50 miles was too fast for the existing conditions. (Transcript of Record, page 168).

On re-direct examination appellants attempted to have Mr. Remington give a full explanation of his statements on

the grounds that when one party brings out a matter the other party is entitled to have such testimony, or inference, explained. The defendant objected and the Court sustained the objection:

Q. Now after you got the vehicle stopped and got up over the crest of the hill to Wells, how was the condition? Tell us what the customary speed would be over the hill?

Hansen: Objected to as having no bearing.

Wright: Probably not sufficient foundation.

The Court: I am going to sustain the objection, I do not see where it is relevant.

Wright: It is this, if the Court please, a person is going along and that is what we want to bring out, on top of the other side.

The Court: What do you mean, other side?

Wright: East of the crest.

The Court: What this witness's customary speed and a person should maintain going over the crossing—objection sustained. (Transcript of Record, page 169).

3. It was error for the District Court to refuse appellants the right to show that it was practicable to do the towing job without getting onto the traveled portion of the highway and that appelee did not need to use so much of the highway and that it was the custom and practice in the towing business to stay off the traveled portion of the highway whenever practicable. Appellants called the witness, William Bellinger, qualified him as an expert towman and attempted to show the existence and nature of the above mentioned customs, that the same was objected to by the defendant and the Court sustained the objections as follows: (for full substance of this testimony see Transcript of Record, page 352 to page 356).

Thereafter appellants made an offer of proof as to the above mentioned customs and practices—which offer is found at page 356 to page 360 of Transcript of Record.

The defendant objected thereto and this objection was sustained by the Court. The grounds of defendant's objections are fully set forth in Transcript of Record, pages 360 and 361.

(The above testimony, offer of proof and objections thereto are not set out in full herein because of their considerable length and we have, therefore, referred the Court directly to the Transcript of Record; this entire sequence of testimony commences in the Transcript of Record at page 352 and ends on page 361).

4. It was error for the District Court to refuse to grant appellants' Motion to Strike from the record the appellee's statement that the tow truck was an emergency vehicle.

The appellee testified on cross examination as follows:

Q. Why did you put this red light on, Mr. Page?

A. It is an emergency vehicle.

Mr. Taber: I move the answer be stricken as conclusion of the witness.

The Court: It may stand (Transcript of Record, page 78)

Also at the conclusion of all the evidence, appellants moved to strike the answer of defendant, Page, that the wrecker he was driving was an emergency vehicle, on the ground that it was the conclusion of the witness, that it was unresponsive and that as a matter of law, the tow truck was not an emergency vehicle. (Transcript of Record, page 306).

5. It was error for the District Court to refuse to admit

offered testimony as to the custom and usage of putting out flags and other warnings. Appellants called the witness, William Bellinger, qualified him as an expert towman, and made an offer of proof to show that the witness was familiar with the custom in reference to the use of warnings and that the custom was as follows:

"One custom is if it is possible to do the work off the entire road, that practice and custom is that the wrecker stays off the traveled portion, or shoulder of the highway. Second, if he cannot do the work there, then the custom is that the wrecker stays on the shoulder and if it stays on the shoulder, that warnings are put out on each side of the wrecker, consisting of flags, or flares, or road signs, "Danger"; that they are put on each side of the wrecker and there is a custom that they have to take into consideration the hilly surface of the highway, whether it is curved or hills, or brow of the hill. That to put the trailer up on the road, it can work on the shoulder and get on the pavement but must keep out different flares as warnings. That the custom is that if there is a hill within half a mile, with ice, or slippery, that warnings, consisting either of flares or signs similar to the 'Danger Ahead' signs, or little flags, or other warnings or flagmen, is placed upon the top of the hill where the vehicle can see it as it comes over the crest. That it is the custom and practice that is recognized in that vicinity. Also the practice is that where there is an icy surface, then you go farther away from the vehicle and if on the crown of a hill, you go farther away with the signs. In other words, before a vehicle approaching comes to that point where there is a curve within half mile, or top of the hill within half mile that is true". (Transcript of Record, page 357-358)

Appellee objected to this offer on the grounds that a

witness cannot give an opinion as to the ultimate fact to be decided by the jury, and that there was no evidence of the custom of wreckers. This objection was sustained by the Court. (Transcript of Record, pages 360-361)

6. The District Court erred in giving Instruction No. 12, which is as follows:

> General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive. (Transcript of Record, page 321)

The appellants objected to this instruction as follows:

"If the Court please, the plaintiffs wish to take exception to No. 12. This instruction deals with the general subject of the duty to look, see objects clearly visible. Under the circumstances, we think it should not be given, because of the ice, the passing truck, the blending of the wrecker with the highway, and it is not applicable. In this connection, if this instruction is given, we believe that we have prepared an instruction to define what is clearly visible, that whether an object is clearly visible depends on all the surrounding circumstances. There isn't anything to define what is clearly visible. Some people might think that standing on the highway is clearly visible and looking up when that person is driving down the road. Under those same circumstances the test is whether or not the object is clearly visible. We would ask the Court at least that modification." (Transcript of Record, page 307)

7. The District Court erred in refusing to give appellants' offered Instruction A, as follows:

> The plaintiffs have the right and the law encourages them to join their actions. You are to determine the rights of each plaintiff to recover as though each case was a separate action. In this connection you should apply the law and facts to each case, separately, without regard to the other cases. (Transcript of Record, page 343)

8. The District Court erred in refusing to give appellants' offered Instruction G:

> You are instructed that a wrecker truck or tow truck is not an emergency vehicle. (Transcript of Record, page 346)

9. The District Court erred in refusing to give appellants' offered Instruction I:

> You are instructed that the Laws of Nevada, Section 4365 of the **Nevada Compiled Laws,** provide as follows: "No person shall stop an automoble, nor permit it to remain standing, on the main traveled portion of any highway for a length of time greater than is reasonably required to make adjustments or repairs; provided, that where there is room to make such adjustments or repairs the motor vehicle shall be driven entirely off the main traveled portion of the highway."
>
> You are instructed that the above law applies to trucks or tow trucks.
>
> In weighing the evidence in this case, you will be guided by a rule now to be stated: When it has been established by the evidence that a person did stop, or leave standing, any vehicle upon the main traveled portion of a highway, and that at such place there was room to have parked said vehicle off of the main traveled portion of the highway, then such evidence is a prima facie

showing of negligence on the part of the person so handling the vehicle and will support a finding that he was negligent in such conduct, unless that showing, together with any other proved facts that support it fails to preponderate over evidence that it was impracticable to stop, or park or leave the vehicle off the main traveled portion of the highway.

In other words, the law places upon a person who stops a vehicle on a main traveled portion of a highway, the risk of being found to have been negligent in so doing, unless he affirmatively shows the impracticability or the impossibility, just mentioned, of handling the vehicle otherwise." (Transcript of Record, page 346)

10. The District Court erred in refusing to give appellants' offered Instruction J:

The operator of a motor vehicle is required to use ordinary care in keeping a lookout to see that which is plainly or clearly visible. When there is evidence to the effect that one did look, but did not see that which was in plain or clear sight, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive.

Whether an object is clearly or plainly visible is a question of fact to be determined from all of the surrounding circumstances. (Transcript of Record, page 347)

11. The District Court erred in refusing to grant apellants' Motion for a New Trial, for the following reasons:

a. Insufficiency of the evidence to justify the verdicts against the appellants, and the verdicts were contrary to the evidence.

b. That the verdicts, against the appellants were against law.

c. Errors in law occurring at the trial and excepted to

by the appellants as more specifically set forth in specification of errors.

d. Orders of the Court by which appellants were prevented from having a fair trial as more specifically set forth in this specification of errors. (Transcript of Record, pages 42-44)

IV.
ARGUMENT

1. It was error for the trial Court to refuse to ask the jurors on voir dire examination if they owned stocks or bonds in the American Casualty Company.

As was pointed out in the Specification of Errors and also at page 37 of the Transcript of Record, appellants made written request of the Court to ask this question and the Court did not do so, nor did it give appellants the chance to ask said question or any similar question. Appellants pointed out to the Court that it was necessary to ask this question to determine the qualifications of the jurors and to determine the exercise of the peremptory challenge. Appellants had the right to have such a question asked.

"It is generally the rule that a juror may be questioned on voir dire with respect to any interest in, or connection with, an insurance company, or its representatives, where the case is one in which such a company may be concerned, in order to ascertain any bias, prejudice, or interest in the case; that such examination is not improper although it incidentally discloses to the juror that an insurance company is, or may be, interested in the result of the action."

50 C.J.S., page 1046

There is also an excellent note on this subject in 56 **A.L.R.,** page 1454. At page 1456 the note concludes as follows:

"The overwhelming majority of Courts sustain the right

of counsel for plaintiff in a personal injury case, so long as he acts in good faith for the purpose of ascertaining the qualifications of the jurors, and not for the purpose of informing them that an insurance company is back of the defendent of record, to interrogate prospective jurors by one form or another of questions, with respect to their interest in, or connection with, indemnity insurance companies. **It has been held error to deny plaintiffs counsel the right to qualify the jurors in this respect."**

This A. L. R. note is supplemented by three subsequent annotations each affirming the above statement and citing numerous cases from nearly every jurisdiction including the Federal Courts.

74 **A. L. R.** 860

95 **A. L. R.** 404

105 **A. L. R.** 1330

The last supplemental note in 105 **A. L. R.** 1330 states:

"Additional support for the **almost universal view** that in personal injury cases and death actions, a plaintiff may in good faith interrogate the jurors on voir dire as to their possible connection with, or interest in, liability insurance companies is found in the following cases—(Thereafter are cited many cases)"

It is also clear that plaintiff has the right to make this inquiry in reference to a specific insurance company. While some Courts have held that the question must be asked in such form as to only refer to insurance companies generally, it is the general view the plaintiffs may ask about a specific company. Referring again to the above mentioned A.-L. R. notes and specifically to 74 **A. L. R.,** page 866:

"It is settled that the right of the plaintiff discussed in the last sub-division may be exercised with specific re-

ference to a designated insurance company, which may be mentioned by name. This is evident from the many cases which have allowed inquiry as whether the jurors were interested in a designated insurance company". The supplemental notes are to the same effect.

95 **A. L. R.** 407

105 **A. L. R.** 1332

Among the many cases supporting this rule are the following:

Maggart v. Bell, (Cal. 1931) 2 Pac. (2nd) 516
Nordyke v. Pastrell, (Nev. 1932) 7 Pac. (2nd) 598
Wagner Elec. Corp. v. Snowden, (C.C.A. 8th, 1930) 38 Fed. (2nd) 599

In the last mentioned Federal case the question was asked if the jurors owned any stocks or bonds in the American Mutual Liability Insurance Company. In considering the question on appeal the Circuit Court said at page 600:

"If, as appears in this case, the insurance company was interested in the defense, it would seem proper when good faith is shown to permit inquiry as to whether or not any of the prospective jurors were interested in that company or acquainted with any of its agents or employees."

Where the question has arisen as to the right of the Court to refuse to allow such a question to be asked, it has been held reversible error.

Smith v. Star Cab Co. (1929, Mo.) 19SW (2nd) 467

Pinter v. Wilson (1932, Mo.) 46 SW (2nd) 548

Gammilt v. Culverhouse (1927 Ala.) 114 So. 800

Appellants submit that the only real limitation on this

right is that the question be asked in good faith. There is nothing in this record to suggest, or even hint, that appellant was acting in bad faith. On the contrary there is every evidence and presumption of good faith. The named insurance company did have an interest in the case, the appellants told the Court they wanted to determine the qualifications of the jurors and did not ask that the question be asked of each juror individually but of the panel as a whole. Since the Judge would be asking the question there would be no undue emphasis placed on the same by association with either party. The mere fact that the question is asked, or that it may incidently reveal the existance of insurance is not evidence of bad faith. In this connection see:

Maggart v. Bell (Cal., 1931) 2 Pac. (2nd) 516

It is also held that where an insurance company is interested, good faith will be presumed.

Wendel v. City Ice Co. (1929, Mo.) 22 SW (2nd) 215
Ulmer v. Farnham, (1930, Mo.) 28 SW (2nd) 113

It should also be noted that the Court did not ask, or permit to be asked, any question whatsoever on this subject, completely denying any right whatsoever to appellants to determine the qualifications of the jurors in this respect. Even if the Court felt that the question which the appellants submitted was not the proper approach, then the Court should have asked the question in a different form. Appellants submit that it was prejudicial error for the District Court to refuse to ask this question, or to make any interrogatories of the jurors on this subject after it had been requested to do so by the appellants.

2. It was error for the Court to refuse appellants the right to get the full explanation from the witness, Earl Remington, concerning his opinion stated on cross-examination that Duff was driving to fast.

On the cross examination of Remington, as was quoted in the Specification of Errors and found on page 168 of the Transcript of Record, Remington expressed the opinion that Duff was driving 40 or 50 miles per hour and that was too fast for the existing conditions "at that particular spot." Remington has previously testified that he was traveling up the hill heading east and Duff was just coming over the crest of the hill heading west and that the road on the west side of the hill was icy (Transcript of Record, page 167-168). Appellants wanted to bring out on redirect examination that Remington had no knowledge of the road conditions of the east side of the hill from whence Duff had just come, that his opinion as to Duff's driving too fast at that particular spot referred only to the icy part on the west side of the hill and that, since Duff had just come over the hill, it may have been that Duff was not driving too fast for the condition of the road on the east side of the hill. Appellants wanted to ask Remington what he found as to road conditions on the east side of the hill after he had driven over the crest, and whether Duff's speed was too fast under those conditions. (Transcript of Record, page 169). The Court refused to allow inquiry into this matter on the ground that it was irrevelant. It could have been brought out from Remington that the road on the east side of the hill and all the way back to Wells, Nevada, from whence Duff had come, was dry and not icy and that Duff couldn't see and would have no reason to believe that there was ice on the other side of the hill until he had actually passed the crest; that Duff's speed of 45 or 50 miles per hour under those conditions was not too fast, that when Remington first saw Duff, Duff was just coming over the hill and had not had opportunity to reduce his speed before he hit the ice on the west side of the hill. Without this explanation on the part of the witness, it left a strong

impression on the jury that Duff was just simply driving too fast, in disregard of the road conditions. The jury was entitled to the full explanation of Remington's testimony about Duff driving too fast.

The principal of law applicable is that when one party brings out a matter, then the other party is entitled to have such testimony, or inference, explained.

> "On re-direct examination a witness may properly be interrogated as to facts, and circumstances tending to refute, weaken, or remove inferences, impressions, or suggestions which might result from the testimony, or inquiries on cross-examination." 70 **C. J.** 702

Where a witness gave an opinion during defendant's cross-examination, the plaintiff could have the witness explain the facts on which the opinion was based.

State v. Gibson, 174 N.W. 34 (Iowa, 1919)
See also:
Wigmore on Evidence, Third Addition, Section 1044
Richardson v. Hoole, 13 Nev. 492, at page 498
Brosman v. Boggs, (Ore.) 198 Pac. 890, at page 892
Vern v. Butte Elec. RR Co. (Mont.) 249 Pac. 1070, at page 1072
Stubs v. Orpheum Theater and Realty Co., (Cal.) 300 Pac. 61, at page 62

In the last cited case, plaintiff brought action for alleged assault and battery. Plaintiff asked questions about the employees of defendant having been arrested on criminal charges and the defendant, over objection, was permitted to show the criminal charge was dismissed. That Court said at page 62:

> "While it is true ordinarily that evidence of acquittal or dismissal of a criminal charge for assault and battery

is inadmissible in a civil action, and the same may be said of all evidence relating to the criminal charge. Here the appellant opened the door for the introduction of the testimony referred to by introducing evidence relating to the arrest and trial of the employee in the police Court **Appellant's evidence standing alone and unaccompanied by evidence of the result of those proceedings would tend to create the impression that the employee had suffered a conviction on the criminal charge. It would be manifestly unfair to respondent to admit the testimony offered by appellant without admitting the further testimony which would dispel the erroneous impression created. We find no error in admission of this testimony."**

It has been held error to exclude such testimony:
"It has been held error for the Court to exclude testimony in explanation of unfavorable evidence. The discretion of the Court in re-examination of witnesses does not go to the extent of authorizing a denial to a party of the right to explain discrediting facts brought out by the other side." 70 **C. J.,** page 705.

Transcontinental Petroleum Co. v. Interocean Oil Co. 262 Fed. 278

Donaldson v. U. S., 208 Fed. 4

And so in this case the witness's statement standing alone tends to create a misleading and entirely false impression upon the minds of the jury and it is manifestly unfair and error on the part of the trial Court to refuse to admit further evidence as offered by appellants in order to obtain a full and complete explanation of the matter and to have the witness explain what he meant by his statements.

3. The Court erred in refusing appellants the right to show that it was practical to do the towing job without get-

ting on the main traveled portion of the highway and that defendant was using too much of the highway.

The testimony of the defendant was that when he arrived at the place where the accident eventually occurred, he placed his wrecker in a position almost directly across the westbound lane of traffic with the rear of the wrecker near the north shoulder of the road and the front of the wrecker only a few feet from the white center line. (Transcript of Record, pages 71 and 72). This was done for the purpose of turning the U-haul trailer upon its wheels and to eventually tow the said trailer back onto the road. The defendant testified that it was not practical to set the trailer on its wheels in any other way than to have his wrecker setting in such a position across the main traveled portion of the highway. (Transcript of Record, pages 297--303)

The appellants called William Bellinger and qualified him as an expert towman in the vicinity. (Transcript of Record, pages 350-352). Then appellants asked Mr. Bellinger questions to show:

a. That there was a custom existing in the area as to towage of vehicles. (Transcript of Record, page 352)

b. That the custom was to do a towing job whenever possible without getting on the main traveled portion of the highway. (Transcript of Record, pages 353-356)

c. That in the towing job in question it was practical to do the job without getting on the main traveled portion of the road. (Transcript of Record, pages 353-356).

As more specifically detailed in the Specification of Errors, these questions were objected to by the defendant and the objections were sustained. Appellants then made an offer of proof to show that the practical, or standard,

practice would be to first put the trailer on its wheels while the wrecker was on the north shoulder, pointed west, and then tow the trailer onto the highway by heading the wrecker east and placing the wrecker on the north shoulder, and then towing the trailer up the embankment and along the shoulder of the road; that it would not be customary, nor necessary, to block the traveled portion of the road. (Transcript of Record, pages 356-360) This offer was objected to and sustained by the Court. (Transcript of Record, pages 360-361)

By refusing the appellants the right to submit the above offered testimony, it left the defendant's uncontradicted statement that there was no other practical way to do the towing job and greatly prejudiced the appellants on the question of the negligence of the defendant in placing his wrecker across the main traveled portion of the highway.

The law is well settled that a wrecker can only block the road where it is necessary and that if the work can be done without blocking the road, the wrecker must stay off the main traveled portion of the road. The Court so instructed the jury in Instruction No. 26 (Transcript of Record, pages 326-327)

The Court by refusing the appellants the right to submit evidence on the question of whether or not it was necessary for the wrecker to block the highway, in effect denied the appellants the right to prove the defendant was negligent and left the whole question of negligence to turn on the uncontroverted and self-serving statement of the defendant.

As to the appellants right to offer testimony of custom and usage by means of an expert witness, the general rule

is stated in the annotation at 137 **A. L. R.,** 611 as follows:

"As to usages or customs of persons generally, or of those engaged in a particular sort of business or occupation, the doctrine almost invariably upheld is that where reasonable minds may differ as to the question of negligence, proof of an existing general usage conforming to or differing from the practice followed by the defendant may properly be admitted in evidence for what it is worth. Such evidence, bearing on the question of the defendant's negligence has been regarded as admissible whether offered by the plaintiff or by the defendant. It is also admissible when tending to establish, or to disprove contributory negligence.

The evidentiary value of the proof of general usage is frequently very clear where the negligence complained of is the failure to use a safety device or other precaution against accident. **In such cases the general usage may serve to illustrate what safeguards were feasible and presumably known to the defendant."**

To the same effect is **Blashfield Encyclopedia of Auto Law,** Vol. 9, Par. 6186.5.

As to the right of an expert witness to testify whether it was practical to do the towing job by staying off the main traveled portion of the road—32 **C. J. S.,** page 235:

"A person who is specifically qualified by skill or experience may state an inference, or judgment, as to the matters connected with the management and operation of vehicles, machinery and other appliances concerning which the jury could not fairly be expected to draw accurate conclusions for themselves."

The question of towage, strength of equipment, practical method, usual method among towmen, standard methods are all the subject of expert testimony. Following are a

few of the many cases which hold that an expert can testify to the mechanical methods of doing work.

DeMargis v. Johnson, Mont. 3 Pac. (2nd) 283, Garageman permitted to testify as expert as to cause of loose spokes of wheel and method of inspection to ascertain defects.

Faulkner v. Mammoth Min. Co., Utah, 66 Pac. 799, miner with considerable experience could testify to manner of ascertaining that there were loose rocks in a mine shaft.

Limby v. Dock Gas Engine, Cal., 180 Pac. 671, expert can testify as to cause of flywheel breaking and method of inspection to discover defects.

Alameda County v. Tieslou, Cal., 186 Pac. 398, motorcyclist with considerable experience can testify as to best method of turning motorcycle.

Hockmen v. Sifers Candy Co., Kan. 178 P. 254, expert can testify as to practicability of safeguards and what safeguards can be used. Suit by employee v. employer for lack of safeguards.

Bowen v. Sierra Lumber Co., Cal. 84 Pac. 1010, expert can testify that train running over trestle will loosen nails.

Ind. Material Supply Co. v. Marshall, Okla., 264 Pac. 830, suit against roofer for defective roof. Defendant called expert to prove cause of defect, refused, held error and reversed.

Smith v. Dow, Wash., 86 Pac. 555, expert stevedore can testify as to proper manner to tie bundles lumber. Stevedore sued for injuries to lumber falling.

Jones v. Ch. M., & St. P. RR. Co., Wash., 172 Pac. 810, expert can testify as to manner of unloading logs.

Berkowitz v. Am. River Gravel Co., Cal., 215 Pac. 675,

expert can testify as to distance auto going 20 M.P.H. can stop.

It has been held that the manner of running, speed and stoppage of locomotives is proper matter for expert testimony. **Wright v. So. Pac.,** Utah, 49 Pac. 309; **Howland v. Oak Cons. Ry. Co.,** Cal., 42 Pac. 983.

Moore v. Norwood, Cal., 106 Pac (2nd) 939, expert can testify where ultimate fact to be proved is one of science, art, or trade.

Thomas v. Inland Motor Freight, Wash., 81 Pac. (2nd) 818, expert can testify that worn brake could cause wheel to lock and to have caused accident.

Zandan v. Atl. Coast Line Ry. Co., S. C. 190 S.E. 817, expert can testify in accident that auto left unattended could not have moved unless engine left running, or intervention of third party.

Acme Poultry Corp v. Melville, Md., 53 A. (2nd) 1, state police officer can testify that tires leave marks if a vehicle is pushed sideways.

Zelayeta v. Pac. Greyhound Lines Co., 232 Pac. (2nd) 572, expert investigator can testify as to point of impact of bus and auto.

Los Angeles and S.L.R. Co. v. Umbaugh, Nev., 123 Pac. (2nd) 224, expert can testify as to approximate stoppage distance of train and train made up as described was going approximately so many miles per hour under those conditions.

Alward v. Poola, Cal., 179 Pac. (2nd) 5, expert can testify as to failure of auto brakes.

Ruxemer v. Cedar Rapid and I. City Ry. Co., 159 N.W. 1048, expert can testify as to practical devises that could be used as signals at crossings.

Kelsea v. Town of Stratford, N.H., 118 Atl. 9, expert can testify what caused auto to tip over in certain position.

In the case of **Brigham Young University v. Lillywhite,** 118 Fed (2nd) 836, a university was sued for not properly supervising a chemistry experiment that resulted in injuries. Expert testimony as to what was done at other universities was admitted and approved (Certiorari denied, 86. L.Ed., 1941)

And so in almost every case where the nature of the facts are such that the jury could not fairly be expected to draw accurate conclusions for themselves, expert testimony has been allowed to show usage, custom and different methods of doing work. Frankly, we cannot think of a more proper case for the use of expert testimony than the case at bar. Towage is a subject that the average juror would know nothing about and would not be able to form an opinion as to whether the job was being done negligently or not. We suggest to the Court that it read the description of the towing job as described by the defendant in his testimony (Transcript of Record, pages 299-302) and the Court will realize the technical nature of this business and the many problems involved; that the same is a proper subject for expert testimony.

The defendant has raised the objection that this type of question invades the province of the jury and is testimony as to the ultimate fact. However, appellants did not ask or attempt to ask, whether the defendant's way was the proper way, or to have the witness state any conclusions or opinions as to negligence. Appellant only wanted to bring out the custom in the locality and whether or not other methods were practical and to refute the defendant's statement that there was no other practical way to do the job. Then the ultimate question of whether the defendant's way was safe and practical under the circumstances, would be up to

the jury. Without the offered testimony the jury would have to speculate as to whether there was any other way to do the job. The offered testimony would have thrown light on this subject and given the jury a basis on which they could determine the issue of the defendant's negligence. Appellants submit that it was error to refuse such testimony.

4. The Court erred in refusing offered testimony as to custom and usage in putting out flags, or other warning devices.

The testimony of the defendant was that he did not put out any flags, or other warning devices, although his wrecker was parked across the traveled portion of a high-speed cross-country highway only .4 of a mile from the crest of a blind hill. (Transcript of Record, pages 73-78). In this connection the defendant testified that he had with him flares, reflectors, signs, fuses and flashes, but that he did not use them.

The appellants called William Bellinger, and qualified him as an expert towman in the vicinity. (Transcript of Record, page 352) Then appellants asked questions of Mr. Bellinger to show:

a. That there was a custom existing in the area as to the use of warning devices. (Transcript of Record, pages 352-353)

b. That it was the custom under certain conditions to put out warning devices. (Transcript of Record, pages 357-358)

As more specifically stated in the Specification of Errors, these questions were objected to and the objections were sustained by the Court; appellants made an offer of proof to show that a custom existed and that the custom was that when it is necessary for a wrecker to block the road, warn-

ings such as flares or signs are put out on each side of the wrecker, that where there is a hill within half a mile, warnings are placed on the crest of the hill, that when the road is slippery, or icy, the warning signs are put out at a greater distance from the wrecker. This offer of proof was objected to and sustained by the Court. (Transcript of Record, pages 357-358)

The principles of law involved in this issue are exactly the same as are involved in the preceding issue on the question of towage. Appellant hereby refers to the cases and authorities quoted on that issue, as to the right of apellant to offer expert testimony on the question of custom and usage.

> The rule is summarized in 32 **C.J.S.,** page 139 as follows: "The existance of a custom or usage in any particular trade, art, or calling may be testified to as a fact by a witness who, by his possession of adequate knowledge of the matter, is qualified to testify."

See also **Taylor v. Jackson,** Tex., 180 S.W. 1142, where it is held that a witness who stated he knew of the custom in the vicinity is qualified to testify thereto.

Pa. R. Co. v. Sate of Md., 53 Atl. (2nd) 562, allowed testimony as to custom of having flagmen at railroad crossing.

Burke v. Marshall Inc., Cal., 108 Pac. (2nd) 738, allowed testimony as to custom that trucks blew horns while approaching workmen on dock.

In **Foster v. Buckner,** 203 Fed. (2nd) 527, plaintiff was a painter on a building and working for a painter subcontractor; a boom operated by another sub-contractor struck the plaintiff held that evidence was admissible of custom that operator of boom around such a building should have a lookout man to guide the boom, since the operator of the boom cannot see in all directions. The Court said, "The

failure of the defendant to follow usual practice is evidence of negligence and admissible.'

We quote again from 137 **A.L.R.**, page 611:

"The evidentiary value of the proof of general usage is frequently very clear where the negligence complained of is the failure to use a safety device or other precaution against accident. In such cases the general usage may serve to illustrate what safeguards were feasible and presumably known to the defendant."

The Court should note from the above authorities that this type of testimony does not invade the province of the jury. That there is a custom and what that custom is, is a fact to be considered by the jury as bearing on the negligence of the defendant. In other words the evidence of custom is a fact to be allowed and considered just as any other fact in the case, and appellants submit that as a matter of law there is no controversy on this point.

"The common usage of a business or occupation is frequently stated to be a test of care or negligence and, accordingly, conformity to custom or usage is very generally regarded as a matter proper for consideration in detemining whether or not sufficient care has been exercised in a particular case." 65 **C.J.S.,** page 404

And again on 407:

"The omission of usual and customary precautions may be a matter proper for consideration in determining whether or not conduct was negligent for, while ordinary prudence may require more precautions than is customary under similar circumstances, or in a similar business or occupation, it can hardly require less, and hence a lack of such precaution may fairly be regarded as negligence."

The record shows that the witness was properly qualified, and that he knew of the custom and what the custom was. The appellants were entitled to have this evidence before the jury for its consideration. It was error to refuse this testimony.

5. The Court erred in refusing to strike the unresponsive statement of the defendant that his wrecker was an emergency vehicle, and the Court also erred in refusing to give appellants' offered instruction G.

The defendant on cross examination volunteered the statement that his wrecker was an emergency vehicle. (Transcript of Record, page 78). At the time of the statement and also at the conclusion of the testimony, appellants moved that this statement be striken as the conclusion of the witness. (Transcript of Record, page 78 and 306) The Court refused to strike this statement.

As a matter of law, a wrecker is not an emergency vehicle. Appellants have searched diligently to find anywhere in the body of law where a wrecker, or tow truck is classified as an emergency vehicle. On the contrary, the statutes of the State of Nevada specifically name the types of vehicles which are emergency vehicles and such statutes do not include tow trucks or wreckers. **Nevada Compiled Laws,** Section 4350.1, (1943-1949 Supplement) In fact, appellants do not believe that defendant's counsel have ever contended that a wrecker is an emergency vehicle. Therefore, as a matter of law, the statement is erroneous and should be stricken. In addition the statement was unresponsive and the conclusion of the witness and should be stricken for that reason.

See **C.J.,** Volume 64, page 208 to the effect that it is sufficient ground for motion to strike if the answer to a question is irresponsive, or involves the conclusion of the witness.

It is stated therein, "It has been held error to deny a motion to strike out an answer to a proper question, when such answer is irresponsive——or involves the conclusion of the witness."

Not only did the Court refuse to strike the statement, but it refused to give an instruction to clear up the matter. Appellants requested the Court to give offered Instruction "G", "You are instructed that a wrecker truck or tow truck is not an emergency vehicle". The Court refused to do so. This left the defendants erroneous and highly prejudicial statement undisputed. The jury, as ordinary people, would naturally think of an emergency vehicle as having some special privilege and having the right-of-way and not being subject to the ordinary rules of traffic. The very suggestion of emergency vehicles creates in all of us an almost inherent impression of special privilege and "pulling to the right to let the fire engine go by". This impression would not normally be dispelled without some direct instruction on the matter. The statement of defendant would tend to create in the minds of the jurors the misleading impression that the defendant's wrecker had some special status as a vehicle, that, like a fire engine, or police car, it could go through a red light, or park in the middle of the road. This impression could not be dispelled by merely giving general instructions of negligence. The statement standing as it did would tend to prejudice the jury against the appellants and in favor of the defendant. The failure to strike this statement and instruct the jury regarding it was prejudicial error.

6. The Court erred in giving instruction No. 12 and refusing to give Appellants offered Instruction J.

The full text of this instruction and appellants' objections thereto are found in the Specification of Errors, and also at pages 321 and 307 of the Transcript of Record. This instruction deals with the duty of a person to see ob-

jects that are clearly visible. In connection with this error, appellants will also discuss the Court's error in refusing offered instruction J, (Transcript of Record, page 347) which deals with the same subject.

The instruction as given by the Court places emphasis on an object being clearly visible and, while this instruction may be a proper instruction in an ordinary case not involving any special problems of visibility, it is not proper in the case at bar where the conditions as to visibility are unusual. Therefore this instruction is misleading and should not be given at all unless some additional instruction is given as to the meaning of clear visibility. In offered Instruction J, appellants proposed to add to the instructions given by the Court the following. "Whether an object is celarly or plainly visible is a question of fact to be determined from all the surrounding circumstances". Thus the jury would know that it was their job to determine the question of clear visibility and that they were entitled to consider all the factors regarding visibility in determining whether or not an object was plainly, or clearly, visible. The instruction as given by the Court leaves an impression on the jury that the object has already been determined to be clearly visible and all the jury has to do is decide the question of negligence.

The record shows that there were many factors to be considered in determining the question of whether or not the wrecker was clearly visible to Duff as he came over the crest of the hill. First, he was suddenly confronted with an icy road, he saw a large truck coming up the hill which he had to pass; his sight was naturally attracted by the more brilliant color of the orange U-haul trailer that was off the road. (Transcript of Record, pages 243-244). On being confronted with these things, his attention was naturally absorbed in trying to keep control of his car on the icy road and especially since there were high embankments on both

sides of the road and he did not want to get too close to the edge and he had to watch the sides of the road carefully. He was also absorbed in passing the large truck on the icy road and was trying to keep an eye on the truck. On top of all this he was concerned about the orange U-haul trailer that was off the road and trying to stop in order to help the people there. In other words, as he came over the hill, there were many things to distract and absorb his attention. Then, in addition, the wrecker itself was not easy to see because it was blended into the background. The top of the wrecker was light blue and blended into the cloudy and hazy sky. (Transcript of Record, pages 97-98 and page 270) Then, Duff was traveling on main U. S. Highway; he had no warning and no reason to believe the road would be blocked and he was not required to assume that there would be obstructions on a highspeed highway such as this one. All of these factors should have been taken into consideration in framing an instruction on clear visibility so that the jury would be clearly and plainly informed of its right and duty to take these things into consideration. What was clearly or plainly visible was never defined to the jury and they had no method to determine what things should be taken into consideration in determining clear visibility.

In the case of **Miller v. Advance Transport Co.,** 126 Fed. (2nd) 442, the plaintiff collided with a truck parked at night on the plaintiff"s lane of travel. The truck had lights, but no flares, or other warning. Plaintiff recovered and defendant appealed. The Court said that even assuming the truck had lights:

> "It must not be over looked that a highway is a place for travel and not for parking. This is not a situation of unavoidable stoppage, as is sometimes referred to by the courts. ——Irrespective of the reason for stopping, how-

ever, there was the duty to give proper and adequate warning to other motorists who might be using the highway. For failure in this respect, the negligence was inexcusable."

The defendant in the above case said the plaintiff was guilty of contributory negligence as a matter of law for not seeing that which was in plain sight. The Court said at page 447, par. 12, 13:

"It is not contended that plaintiffs were driving at an excessive rate of speed. As they approached the point of collision they were confronted with what we think may be termed an extraordinary situation. Flares and torches were burning on the opposite side of the road where four large trucks were stopped. Their attention must have been diverted to some extent. They had a right to assume that the lane on which they were traveling was free of obstruction or, if not, that the one responsible for its blocking would give adequate and proper warning thereof. . . . It is well to keep in mind that it is easy for a person, skilled or otherwise, to dissertate on what could or should have been done to avoid an accident. Circumstances and conditions, difficult and confusing, when faced, appear simple in retrospect. Hindsight may give a more accurate appraisement than foresight, but the existence or want of ordinary care must be determined from the latter rather than the former point of view."

In **Gregory v. Suhr,** Io., 277 N.W. 721, the Court refused an instruction that the plaintiff, who ran into a parked truck, was required to keep vigilant or reasonable lookout upon the basis that the plaintiff had the right to assume the highway was free until notified to the contrary.

In **Morrison v. Perry,** 140 Pac. (2nd) 772, the Court held it was error to instruct, in the case of a motorist collidnig

with a motor vehicle, that plaintiff must not drive at a speed faster than that which he could stop within the range of his vision and also it was error to instruct the jury that the plaintiff was required to keep a constant lookout. The Court pointed out that the motorist had the right to assume, until warned of the contrary, that the highway was free and unobstructed. To the same effect are the following cases:

Winder & Son v. Blaine, Ind. 29 N.E. (2nd) 987 at 989.
Spiker v. City of Ottumwa, Io., 186 N.W. 465, at page 467, wherein the Court said, "There is no rule by which failure to look out for or discover danger when there is no reason to apprehend any can rightfully be held contributory negligence as a matter of law."

Flowers v. S. C. State Highway Dept., S.C., 34 S.E. (2nd) 769 at 771.

The import of the instruction No. 12 as given by the Court is that, when a person looks and does not see what is in "plain sight", he is negligent and inattentive. This is not the law, as can be seen from the above cases. Where there is an extra-ordinary situation, where there are distractions, a person may very well look and be attentive and yet miss what is in "plain sight". A motorist has the right to assume that the road is clear and he does not have to keep constant lookout for obstructions even though they may be in "plain sight". On the contrary, it is the duty of the one obstructing the road to give adequate and sufficient warning. For these reasons it is felt that instruction No. 12 is improper and should not have been given, and it was error to give such instruction.

But if such an instruction was given, it should have been comprehensive enough to clearly and adequately define plain sight and what the jury should consider in connection

therewith. The cases hold that clear visibility must be considered under all the surrounding circumstances.

Martin v. Reihel, Minn., 34 N.W. (2nd) 290
Gaskill v. Melella, Pa., 18 Atl. (2nd) 455
Carter v. LeBlanc Lumber Co., La., 37 So. (2nd) 471

The above cases are to the effect that a failure to see can be explained by distractions and blending terrain.

Kimmel v. Mitchell, Io., 249 N.W. 151 at page 153, failure to see explained by plaintiffs attention distracted by lights from the defendant's parked truck shining into barrow pit.

Flowers v. S. C. State Highway Dept., S. C. 34 S. E. (2nd) 769 at 771, the color of the truck blended with the street and explained failure to see.

Lipford v. Gen. Road and Drainage Co., S.C. 110 S.E. 405, Defendant's truck blended with road, explained failure to see.

Miller v. Advance Transport Co., 126 Fed. (2nd) 442, at page 447, failure to see explained by distraction on the road.

Thus it can be seen that the appellants were at least entitled to have added to the instructions as given by the Court the words, "Whether an object is clearly or plainly visible is a question of fact to be determined by the jury from all of the surrounding circumstances." It was error for the Court to refuse to add these words to the instruction as given.

7. The Court erred in refusing to give appellants' offered Instruction A. (Transcript of Record, page 343).

This instruction deals with the right of plaintiffs to join their action, but the jury is to determine the rights of each of he plaintiffs separately. There is no controversy that

this is a correct statement of the law. The only question is whether it was necessary to give the instruction in the case at bar. Appellants feel that it was necessary to plainly instruct the jury as to their separate rights. There were three plaintiffs in the action; they were all riding in the same car; one of the appellants Jennie R. Duff, was the wife of the driver, John R. Duff. It is natural and easy for the jury under these circumstances to consider the plaintiffs as a group instead of separate individuals with separate rights. An instruction was needed to point out to the jury that they must consider the case of each plaintiff as a separate matter. This type of instruction finds support in **California Approved Jury Instructions,** Section 52. It is an instruction that is used frequently and has been declared by the courts to be necessary and proper.

McCallum v. Howe, Cal., 243 Pac. (2nd) 894

Fresno City Lines, Inc., v. Herman, Cal., 217 Pac. (2nd) 987

In this connection see 88 **C.J.S.,** page 813, to the effect that where a jury may find in favor of some of the parties and against others, they should be so instructed.

New England Nat. Bank of Kansas City v. Hubbell, Idaho, 238 Pac. 308.

The nature of this case was complex, there were many instructions on the various rights, duties, defenses and so forth of the plaintiffs and similar instructions in reference to the counterclaim of the defendant. Under such circumstances, it is easy for the jury to become confused and even though the rights of the various parties were touched on in some of the other instructions, a clear, separate and distinct instruction was needed to specifically point out the separate rights of the appellants. No such instruction was given and therefore it was error to refuse to give plaintiff's offered instruction A.

8. The Court erred in refusing to give appellants' offered Instruction I.

The full substance of this instruction is set out in the Specification of Errors at page 346 of the Transcript of Record. The substance of this instruction is that under Section 4365, **Nevada Compiled Laws,** it is unlawful for a person to stop or park on the main traveled portion of the highway unless he can affirmatively prove that it was necessary for him to do so; that a person found to be parked, or stopped, on the main traveled portion of the highway is prima facie negligent and has the burden of proving that it was necessary for him to be there. The text of said Section 4365 is as follows:

> "No person shall stop an automobile, nor permit it to remain standing, on the main traveled portion of any highway for a length of time greater than is reasonably required to make adjustments or repairs; provided, that where there is room to make adjustments or repairs the motor vehicle shall be driven entirely off the main traveled portion of the highway."

It is a well settled law that the violation of a statute of this nature is negligence.

> "The generally accepted view is that violation of a statutory duty constitutes negligence as matter of law, or according to the decisions on the question negligence per se, for the reason that non-observance of what the legislature has prescribed as a suitable precaution is failure to observe that care which an ordinarily prudent man would observe." 65 **C.J.S.,** page 418.

> "The rule supported by the great weight of authority is that a violation of traffic regulations of a state or municipality, so far as they embody express commandments governing the use of vehicles, is negligence per se . . ."

Blashfield Ency. of Auto Law and Practice, Vol. 4, Sec. 2681.

And in Section 2691 (under Violations of Statutes)

"The general rule is that the act of stopping or parking, or leaving a motor vehicle in the highway constitutes negligence per se."

And in 38 **Am. Jur.,** page 827, that it is the great weight of authority that the violation of a statute is negligence per se. It should be noted that these authorities stating the general rule are talking about negligence per se, which imposes a much greater burden on the defendant than the instruction offered by the appellants which speaks in terms of prima facie evidence. And, while most of the cases go so far as to hold negligence per se in these cases, at the very least all of the cases hold it is prima facie negligence to violate a statute. See **Blashfield Ency. of Auto Law and Practice,** Volume 4, Section 2701. Appellants know of no substantial authority which holds that the violation of a statute is not at least prima facie negligence and that the **jury had a right to consider the statute in connection with the other evidence of the case.** The Court in the case at bar, by refusing to give this instruction, made it impossible for the jury to consider this statute in connection with the negligence of the defendant in parking his wrecker on the highway and such was prejudicial error. In other words, one of the most important items of evidence as to the defendant's negligence, i. e., his violation of a statute, was not mentioned to the jury. Appellants were clearly entitled to an instruction on this subject.

"Where the issue is raised by the pleadings and evidence, the Court should properly instruct the jury as to the rights and duties of the parties involved in a collision between a vehicle and another vehicle parked or left standing in the highway, **including the duties imposed**

by statute." Blashfield Ency. of Auto. Law and Practice, Volume 10, Section 6713.

Gaches v. Daw, (Wash. 1932), 10 Pac. (2nd) 1111.

"An instruction based on a statute respecting stopping on highways was properly given and was to the effect that "if appellants stopped their car on the paved portion of the highway, when it was practical to leave the vehicle standing off the highway, then they were guilty of negligence as a matter of law."

Huston v. Robinson, (Neb. 1944) 13 N.W. (2nd) 885 is a case involving a statute very similar to the Nevada Statute. The Court said at page 888, "Where the evidence shows that a vehicle was left standing on the paved, improved, or main traveled portion of a highway, a prima facie violation of the statute is established and it is encumbent upon the person charged to show the existence of facts which take him out of the scope of the act. In the instant case, therefore, the evidence that the defendant's car was standing on the pavement is evidnce of a violation of statute relative to the use of motor vehicles on our highways which if found to be true is evidence of negligence which the jury may consider."

It is also clear that the appellants having proved a prima facie violation of the statute, the defendant must affirmatively show an excuse for such violation.

In 131 **A.L.R.,** at page 603, it states:

"It has been held that the burden of proving the necessity or excuse of stopping on the main traveled portion of the highway, within the meaning of the statutes generally regulating stops on the highway is upon the person making the stop."

Silvey v. Harm, (Cal. 1932) 8 Pac. (2nd) 570, was a negligence action similar to the one at bar. The Court said,

"The violation of a statute prohibiting the parking or leaving of a car on the traveled portion of the highway when it is practical to remove the car will constitute negligence per se, which shifts the burden of proof to the party so charged to show that it was not practical within the meaning of the statute for him to move the car off the paved or main traveled portion of the highway."

Casey v. Gritsch, (Cal. 1934) 36 Pac. (2nd) 696, "It is not the duty of a party injured in a collision under such circumstances to show that parking was not necessary, but it is the duty of the other party to bring himself within the exception prescribed by statute."

In other words, the authorities are almost unanimous that the jury has the right to consider the statute as evidence of negligence, and where the injured party has proved a prima facie violation of the statute, then the defendant must affirmatively prove the impracticability of moving his vehicle off the highway. In the case at bar, the agreed facts state there was a 7½ foot shoulder on the north side of the road (Transcript of Record, page 24) and the defendant admitted that his wrecker was parked on the main traveled portion of the highway. This is a prima facie violation of the statute, and it was then the affirmative duty of the defendant to bring himself within any exception to the statute, and the jury should have been so instructed. It was for the jury to determine the negligence of the defendant in the light of this statute and the obligations imposed thereby. The appellants were prejudiced by the refusal of the Court to give this instruction. In connection with this, the appellants again draw the attention of the Court to the tremendous importance of the testimony of William Bellinger which was offered and refused by the Court and is discussed herein under subsection 3. His offered testimony was as to practical methods of doing the towing job without getting on the main traveled portion

of the highway. These were all things which greatly bear upon the negligence of the defendant and they are things which the jury had a right to consider and the refusal of the trial Court to allow these matters was gross prejudice to the appellants herein on the issue of negligence, and the Court erred in rejecting this matter.

9. It was error for the trial Court to refuse to grant appellants' motion for a new trial.

Appellants will not further brief this point, except to refer the Court to the errors heretofore specified and briefed. Because of these errors the trial Court should have granted the appellants a new trial as the same were proper grounds for a new trial, to-wit:

a. Errors at law occurring at the trial and excepted to by appellants.

b. Orders of the Court by which appellants were prevented from having a fair trial.

In addition to the above, the trial Court should also have granted a new trial on the grounds that there was insufficient evidence to justify the verdicts against the appellants and that the verdicts were against the law and the evidence. The weight of the evidence in this case was clear. It is difficult to imagine anything more negligent than to park a vehicle across an icy, high speed, cross-country highway .4 of a mile from the crest of a blind hill without putting out any kind of flags or warnings and with only the self-serving statement of the defendant to justify the necessity of his being there. On the other hand, there is no evidence in the record that the appellants were negligent. The whole weight of the evidence sustains the appellants and to permit otherwise was a miscarriage of justice. The law in reference to New Trials is that it is the duty of the judge to weigh the evidence and prevent a miscarriage of justice.

Aetna Casualty & Surety Co. v Yeatts, (C.C.A., Va., 1941) 122 Fed. (2nd) 250

Kaufman v. Atlantic Greyhound Corp., (D.C., W. Va., 1941) 41 F. Supp. 252

General Acc. Fire and Life Assur. Corp., (D.C., Cal., 1945) 61 F. Supp. 153

Grayson v. Deal, (D.C., Ala., 1949) 85 Fed. Supp. 431

Daffinrud v. U.S., (C.C.A., Wis. 1944) 145 Fed. (2nd) 724.

All of the above cases not only state that it is the duty of the trial Court to weigh the evidence and prevent a miscarriage of justice, but that he should do so even where there is some evidence to support the verdict and even though there may be substantial evidence which would prevent the direction of a verdict. The cases also hold that the Judge cannot be arbitrary about granting a new trial, but that it is his duty to grant the same when he concludes there has been a miscarriage of justice, or that the weight of the evidence was against the verdict.

"In passing on motions for new trial, trial judge is not bound by conflicts in the evidence but in effect sits as a thirteenth juror with duty of reviewing the evidence and passing on its sufficiency and, if he concludes that the verdict has resulted in a miscarriage of justice, it is his duty to grant a new trial." **Gen. Acc. Fire and Life Assur. Corp.,** (D.C., Cal., 1945) 61 Fed. Supp. 153.

"Where there is legal ground that requires the Court in the interest of justice to grant a new trial, there is no basis for the court to act arbitrarily by denying a new trial." **U.S. v 3969.59 Acres of Land,** (D.C. Idaho, 1944) 56 Fed. Supp. 831.

In order to prevent a miscarriage of justice in the case at bar, the trial Court should have granted a new trial to the appellants and his refusing to do so was error.

V
CONCLUSIONS AND SUMMARY

We submit that the errors of the trial Court as specified herein were prejudicial to the appellants and prevented them from having a fair and proper trial. Without again specifying each of the errors committed by the trial Court, we can summarize the matter for the Court. In looking at the whole case and the whole evidence, it is manifestly apparent that the issue of the defendant's negligence was not properly put before the jury. Here was a defendant parking his truck on the main traveled portion of a high-speed highway in prima facie violation of state statute, the road is slick, and there is a blind hill .4 of a mile to the east, yet this man put out no signals, no flares, nor signs or warnings of any kind. The only evidence in the record to justify this type of dangerous (see defendant's own statement that this was a dangerous position, Transcript of Record, page 79) conduct was the defendant's own self serving statement that there was no other practical way to do the towing job, and he didn't think it was necessary to put out warnings (Transcript of Record, pages 92, 93). Yet the trial Court refused to allow the appellants to put in competent and expert testimony concerning the customs and usages as to putting out warnings and methods of towing and the practicability of doing the tow job without getting on the main traveled portion of the highway; the Court refused to instruct the jury as to the uncontroverted law that one who violates a statute, or ordinance, is at least prima facie guilty of negligence and in fact did not even mention the fact to the jury that there was such a statute in the State of Nevada prohibiting people from stopping on highways unless they can affirmatively show

good reason therefore; and then the Court allowed the matter to go to the jury under the misleading impression that a tow truck was an emergency vehicle, when, as a matter of law, it is not. The Court refused to qualify the jury as to their possible interest in the insurance company which was interested in the defendant's insurance.

We submit that nothing could be more unfair and prejudicial than the above errors committed by the trial Court, which in practical effect almost directed a verdict of not guilty on the issue of the defendant's negligence.

And then the trial Court failed to clearly instruct the jury as to separate rights of each of the plaintiffs. Whatever may be said of the negligence of the driver, John A. Duff, there is no evidence in the record of negligent conduct on the part of the appellants which was the proximate cause of the accident. The appellants were entitled to a simple and direct instruction that their rights should be considered separately. This the Trial Court refused to do.

For these reasons, as well as for the other reasons that have been specified herein, the appellants submit that the trial Court was in error and the appellants were prejudiced thereby and the case should be reversed and remanded to the Trial Court with proper instructions.

Respectfully submitted,

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